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Analysis of market access issues facing developing countries: Impact of anti-dumping and countervailing actions

Note by the UNCTAD secretariat

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I. Background

1. The Expert Meeting on the Impact of Anti-Dumping and Countervailing Actions was held at the Palais des Nations, Geneva, from 4 to 6 December 2000. The decision to convene this Meeting was taken in accordance with paragraph 132 of the UNCTAD X Plan of Action (TD/386), which states that "UNCTAD's work should relate first to analysis and, where appropriate, on the basis of the analysis, contribute to consensus-building on: impact of anti-dumping and countervailing duties actions". This decision was confirmed by the Trade and Development Board at its twenty-fourth executive session on 12 May 2000.

2. On the basis of concrete experiences presented by national experts, presentations by resource persons and the background note prepared by the secretariat (TD/B/COM.1/EM.14/2), discussions focused on: (i) the review of the current trends in the application of anti-dumping and countervailing measures; (ii) the examination of the impact of application of anti-dumping and countervailing measures on member States, particularly, developing countries; (iii) the operation and implementation of the WTO rules on anti-dumping and countervailing measures; and (iv) the identification of the main issues and areas of concern that need to be addressed. Experts identified nearly 30 specific issues with respect to dumping, injury and procedure, and areas of concern to developing countries. It was suggested that these issues and areas of concern be addressed, as appropriate, in (i) future multilateral trade negotiations; (ii) the current activities of the WTO Committee on Anti-Dumping Practices and its organs; (iii) the WTO dispute settlement mechanism; (iv) national policies of member States; and (v) the future work of UNCTAD and other relevant international organizations in this area, including technical assistance activities. The discussions focused on the application of anti-dumping and countervailing measures, and did not touch on more theoretical economic themes, such as the economic logic of anti-dumping systems, which has been the subject of considerable debate among economists.

3. The Meeting presented a unique opportunity for public and private actors, and trade negotiators and practitioners from both developed and developing countries, as well as WTO members and non-members alike, to express their views and concerns in an international forum, which would facilitate (or contribute to) consensus-building on the impact of anti-dumping and countervailing actions.

II. Areas for further action: recommendations based on the experts' discussions

4. The experts focused on the following elements of anti-dumping problems: determination of dumping, determination of injury, procedures and the special concerns of developing countries.

Dumping

5. With respect to dumping, experts identified a series of practices which they considered led to more frequent findings of dumping and higher dumping margins, and suggested that these problems could be mitigated through certain clarifications of specific provisions of the AAD (i.e. the Agreement on Anti-Dumping, or officially the Agreement on the Implementation of Article VI of GATT 1994). Provisions referred to included the 5 per cent test rule, exclusion of sales below cost, calculation of credit costs, constructed normal

value, duty drawback, level of trade, exchange rate fluctuations, zeroing, exchange gains or offsets, and higher *de minimis* thresholds.

6. It was noted that certain industries, described as "cyclical", were characterized by recurring periods of overproduction, and that the current treatment of sales below cost could lead to the massive imposition of anti-dumping measures. It was suggested that a solution be sought to deal with this problem.

7. There was considerable discussion of the issue of non-market economies. Some experts considered that non-market economy regulations were being applied against their countries, although they did not meet the criteria set out in Article VI of GATT 1994, and that in future the surrogate country approach should be applied only against countries which met those criteria, such as a total government monopoly of trade and all prices being set by the State. Other experts noted that in some countries serious problems existed in determining normal value (due to lack of generally accepted accounting principles, State-owned corporations, inputs provided by the Government, etc.) which required that the surrogate country approach be followed. Some experts considered that if non-market-economy criteria were to be applied against their exports, regardless of any conflict with the GATT rules, this should be done in a fair manner which did not lead to excessive margins of dumping.

Injury

8. Experts also addressed practices relating to the determination of injury, which in their view also required clarification. It was considered that action to raise the thresholds for negligibility, to base thresholds on market share rather than on share of total imports, and to exclude "negligible" imports from cumulation in injury findings would reduce the number of actions against small suppliers, notably developing countries. Respect for the lesser duty rule, i.e. applying anti-dumping duties no higher than those needed to prevent injury, would also reduce the trade impact of anti-dumping measures.

9. In addition, experts addressed issues of standing and urged that practices which led to reduced scope for the domestic industry (for example, by excluding "captive production") and thus a greater probability of determining injury should be used only when clearly justified.

Procedures

10. Experts expressed many concerns with regard to procedures followed in anti-dumping cases. They found that excessively complicated and lengthy questionnaires, often in languages in which their enterprises were not fluent, led to their not providing the necessary information within the required time limits. The questionnaires should be simplified, and the difficulties in translation taken into account.

11. There were also problems with the imposition of anti-dumping duties, in that some remained in force for an extended period of time despite the "sunset" clause, while in other cases investigations were initiated immediately after the termination of a previous investigation on the same product. In yet other cases, price undertakings were not accepted, although this would have permitted a less trade restrictive solution.

Special concerns of developing countries

12. Experts focused on the special concerns of the developing countries, noting the devastating effect that anti-dumping actions could have on their economies and societies, and particularly on their attempts at export diversification. It was observed that Article 15 of the AAD, which obliged countries to explore the possibilities of constructive remedies before applying anti-dumping duties against the exports of developing countries, remained a "best endeavour" undertaking. A number of the solutions proposed above, such as higher thresholds for *de minimis* dumping, "negligible" imports and *ad valorem* subsidies, could result in developing countries having to face a reduced number of anti-dumping actions. This was particularly important because of the difficulties they encountered in defending the interests of their exporters in anti-dumping cases, due to their lack of financial resources and familiarity with the specific technicalities of anti-dumping cases. It was suggested that studies could be carried out by UNCTAD to identify the positive trade impact of raising thresholds to higher levels.

13. Many experts, particularly from African countries, argued that their domestic markets were flooded with dumped imports which were having a disastrous impact on their domestic producers, but they found that they did not have the financial, technical and human resources to conduct investigations. While some experts from developed countries indicated that their countries could provide resources to support efforts to strengthen the administrations of those countries, the question arises as to whether this would constitute the optimum use of scarce financial and human resources. Efforts could be made by UNCTAD to assess the scope of the problem and attempt to devise a more constructive solution for these countries.

Future action

14. Many experts considered that a lack of clarity in the rules and disciplines remains. In this context, they indicated other problems which were not a result of neglect of the obligations contained in the AAD, but of importing countries' legislation permitting domestic complainants to make full use of the flexibility provided in the AAD. Some experts urged the authorities of importing countries to seek to avoid the problems which had been identified in their application of anti-dumping and countervailing duties. More clarity could be given to the disciplines in the context of the work done in the WTO Committee on Anti-Dumping Practices, in particular its Ad Hoc Group on Implementation, which should produce rapid and meaningful results in the form of formal recommendations on the implementation of the AAD. Other improvements might be achieved in the current work on implementation in the WTO General Council, or await a new round of multilateral trade negotiations. Some experts considered that a tightening of the disciplines was an urgent matter in order to prevent a situation in which the elimination of the Multi-Fibre Arrangement (MFA) quotas under the WTO Agreement on Textiles and Clothing would be followed by a wave of anti-dumping actions against countries' exports of textiles and clothing.

15. Experts noted that there had been an increase in recourse to the WTO dispute settlement mechanism with respect to anti-dumping measures, and welcomed the efforts made in establishing greater precision and predictability in the rules with a view to facilitating international trade.

III. Policy comments by UNCTAD member States

16. Pursuant to the Trade and Development Board's decision taken at its twenty-fourth executive session, the outcome of this Expert Meeting was circulated by the secretariat to member States in December 2000 with a request for policy comments on the experts' recommendations.

17. Mauritius has requested that under the heading "Small Economies", the scope of paragraph 38 of the document (TD/B/COM.1/EM.14/L.1) be expanded by including a specific reference to the need to provide assistance in the elaboration of legislation and the setting up of the Investigation Authority. Furthermore, a suggestion was made in the context of the discussions that Article 15 of the AAD should contain a new paragraph that exempts small economies from anti-dumping investigation. Mauritius wished this to be reflected in paragraph 40 of the outcome document.

18. Pakistan requested that the following points made by its expert on the first day of the meeting be included in the outcome document.

- Repeated/back-to-back anti-dumping investigations in some jurisdictions on the same product originating from the same countries are important issues, particularly from a developing country point of view, and therefore need to be suitably addressed.

- The lesser duty rule as envisaged in Article 9.1 of the AAD, which is currently not mandatory, must be made so. The AAD speaks of a causal link between dumping and injury to the industry. Anti-dumping action depends primarily on the establishment of such a link. If no injury is found, anti-dumping action cannot be taken even if there is dumping. Secondly, anti-dumping action is corrective in nature (i.e. duty is applied to the extent necessary to remove the injury) rather than punitive. It is therefore imperative that lesser duty be applied as a rule through mandatory provisions.